DATE: December 2, 1998
CASE NO.: 97-ERA-00056

In the Matter of

DOUGLAS W. FOLEY

Complainant

v.

BOSTON EDISON COMPANY

Respondent

Appearances:

Douglas W. Foley
Pro Se

Keith Muntyan, Esquire
Robert Morris, Esquire
For Respondent

Before: ROBERT D. KAPLAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (the "ERA" or the "Act"). The Act protects employees who assist or participate in actions to carry out the purposes of the federal statutes regulating the nuclear energy industry. Section 210 provides, *inter alia*, that "no employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §2011, et seq.)." 42 U.S.C. §5851(a)(1)(A). The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission (the "NRC") who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

The claim in the instant case is brought by Douglas W. Foley ("Complainant") against his former employer, Boston Edison Company ("Employer" or "Respondent"). A hearing was held before me in Providence, Rhode Island on November 4-5, 1997. The parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. Claimant and Respondent filed briefs on September 21, 1998.

Complainant contends that because he raised a "safety concern" regarding the calibration and use of testing equipment, Employer subjected him to adverse employment actions. Respondent argues that Complainant's action is time-barred and that, even if Complainant's complaint were timely, Complainant never raised safety concerns and therefore he did not engage in "protected activity" under the Act. Finally, Respondent contends that it did not subject Complainant to any adverse employment action or retaliatory discrimination because he engaged in protected activity under the Act.

ISSUES TO BE RESOLVED[1]

1. Whether Complainant's expressions of concern regarding the hardness tester machine on May 29, 1995, and on several dates in June 1995, and his refusal to use this device, constitute protected activity under the ERA.

2. Whether Complainant filed a timely complaint with regard to Respondent's allegedly discriminatory 1995 actions.

3. Whether Respondent's allegedly discriminatory acts violate the ERA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary Of The Evidence

Complainant holds a bachelor of science degree in engineering from the Merchant Marine Academy and a master's degree in business administration from Western New England College. Complainant was certified as a plant engineer by the American Institute of Plant Engineers in 1995. Complainant began his employment with Respondent on July 25, 1985, as an associate quality control engineer at its Pilgrim nuclear power plant in Plymouth, Massachusetts, where he was a member of a trade union, Local 387 of the Utility Workers' Union of America ("Local 387"). (TR 105-106, 133)[2] The supervisory hierarchy at the Pilgrim plant in descending order above Complainant was as follows: Frank Famulari, department manager; Richie Venkataraman, division manager; Linda

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[1] At the hearing, I ordered the case bifurcated into separate proceedings for liability and remedy. This decision will address only the issue of Respondent's liability.

[2] The following abbreviations are used herein: "CX" refers to Complainant's exhibit; "RX" refers to Respondent's exhibit, and "TR"refers to the transcript of the November 1997 hearing.

Simons, procurement quality engineering supervisor; Paul Sullivan, senior quality engineer/receipt inspection. From about May 1990 to May 29, 1995, Complainant was employed as a quality assurance engineer, engaged in the testing and inspection of components received for use at the Pilgrim plant. (TR 105-107,112-113) Complainant worked with Paul Sullivan, the senior quality assurance engineer and a member of management. Although Sullivan was not Complainant's supervisor at that time, he had authority to direct Complainant to undertake "certain projects." (TR 114-115, 463)

On May 29, 1995 Complainant and Sullivan were assigned to the receipt inspection area. In order to perform their jobs, both used a device known as a Rockwell/Wilson Hardness Tester (the "RHT"), which tests the hardness of nuclear-grade materials. (TR 117) The RHT contains "A" and "B" scales. Sullivan told Complainant he had been experiencing problems with the calibration of the "B" scale.[3] (TR 360-361) Sullivan instructed Complainant to use the "A" scale, notwithstanding the problems with the "B" scale. Complainant replied that "because of the questionability of one of the scales, the whole machine is in question", and objected to the use of the "A" scale. Complainant stated he believed that it was irresponsible to use a scale on a machine that could be out of calibration or be a safety concern. (TR 118) In response, Sullivan told Complainant to perform a "go/no go" test to determine if the machine was still in calibration. A go/no go test is a "quick check... of a machine with known standard test blocks to give [one] an idea [whether] that machine is still within calibration." (TR 428-430) Complainant had performed go/no go checks on other equipment in the past. (TR 436) In this instance, Complainant told Sullivan that he would not perform a go/no go test, because he believed that it would not adequately determine whether the machine was out of calibration. (TR 433-434) The discussion between Complainant and Sullivan escalated into a heated argument. (TR 114-115) Complainant, apparently distraught, then left the Pilgrim plant and went home before the end of his work shift. (TR 456-457)

On May 31, 1995, the work day following Complainant's argument with Sullivan, Sullivan sent a memorandum to Simons, Complainant's supervisor, in which Sullivan expressed discontent over Complainant's work performance and requested a "limited" audit of his work. (TR 128, 131) On June 5, 1995 Complainant was called into Famulari's office to discuss Complainant's work habits, work performance, and his argument with Sullivan. (TR 141) At that time Complainant expressed his concerns about the RHT. (TR 141) On June 7, 1995, Simons and Sullivan went to Complainant's work area and Simons told Complainant to remain at his work location from 7:00 a.m. to 3:30 p.m. Monday through Friday. Simons also told Complainant that Sullivan would now be his supervisor. (TR 143) On June 12, 1995, Complainant was called into Famulari's office, where he was issued an oral reprimand regarding poor work performance, unauthorized absence, insubordination, and poor attitude. (TR 148-149; CX 1; RX 1) On June 14, 1995, Complainant was called to a meeting with Venkataraman, Famulari, and Sullivan. At that time Famulari stated that the "limited" audit of his work had uncovered that Complainant had falsified documents relating to the inspection of some

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[3] In the several months before May 29, 1995, Sullivan had experienced problems with the RHT's "B"scale. The RHT's vendor's representative advised Sullivan that it was appropriate to use the "A" scale, notwithstanding the problems with the "B" scale. (RX 1, pp.16-17)

nuclear components.[4] (TR 155-159) Because of this determination, Complainant was removed from the quality assurance department, his certification as a plant engineer was revoked, and all of his prior 1995 work was audited. (TR 163; RX 1) On June 27, 1995, Complainant was suspended from work for 20 days for having falsified his inspection reports.[5] (RX 1) On July 25, 1995 Complainant returned to work, and according to his testimony, was subjected to difficult working conditions, including undergoing a "remediation" process which included progress tests and evaluations. Complainant was instructed by Famulari to review the Employer's procedures and standards and to direct any questions he might have to Simons or Sullivan. (RX 1)

As Complainant was dissatisfied with his working conditions in the quality assurance department, subsequently he bid on and was selected over three other applicants for the position of mechanical planner in the work control department at the Pilgrim plant, effective November 14, 1995. (TR 323, 466-467, 481) The position paid complainant $1.62 an hour more than his previous position as a receipt inspector. (TR 465) After serving in this job for more than ten months, Complainant, at his physician's recommendation (apparently because Complainant claimed to be under severe emotional stress), requested and was placed on disability leave by Respondent, effective August 25, 1996. (TR 216-218,485-486) Complainant returned to work on March 30, 1997. (TR 218) However, again at his physician's recommendation, Complainant did not return to work at the Pilgrim plant. Instead, Complainant had requested and was granted a transfer to Employer's corporate offices, where he was assigned to work in the billing department. (TR 218, 490-493) Complainant's new responsibilities consisted of "stuffing and mailing" envelopes, filing, and other "clerical" duties. (TR 219) In this position, Complainant received the same wages and benefits that he had been paid while employed in the Pilgrim plant.

On June 11, 1997, Complainant applied for tuition reimbursement by Respondent of $8,000 for a course on Microsoft Windows network administration scheduled to begin in September 1997 at Clark University. (TR 229; CX 6) Complainant sent the request to his former manager at the Pilgrim plant, Stuart Minihan. Minihan opposed the request. On Complainant's "Tuition Assistance Application Form," Minihan stated: "I cannot support this expenditure based upon the fact that there is no relationship between [Complainant's] position (mechanical planner) and the course he seeks to enroll in. It would not enhance his ability to plan or elevate his job performance." (CX 6) Sandra Straqualarsqui, an administrator of Respondent's "Tuition Assistance Program", disagreed with

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[4] Employer's investigation of Complainant's past work performance revealed that he had falsified records: Complainant reported that he had inspected parts which remained sealed in plastic bags even though, as he admitted, the inspection could not have taken place without removing the parts from their bags. Complainant testified that his conduct constituted a "mistake" rather than "falsification." (TR 159-162)

[5] On October 30, 1995, John Cibelli, human resources manager at the Pilgrim plant, reduced Complainant's suspension from 20 days to three days. This decision was based on Cibelli's review of "further information regarding the practices of receipt inspections at [the] Pilgrim [plant]...." (CX 18, RX 1, p. 24)

Minihan and recommended approval of Complainant's request to Lee Wise, the senior human resources consultant at the Pilgrim plant. (TR 581, 583-584). Wise was unable to reach Minihan, and Wise then called Clair Goddard, the plant manager (the next level of management above Minihan). (TR 584) At Wise's request, Goddard approved the tuition reimbursement. (TR 586-587) Wise obtained the necessary approval on the same day that she first learned of Complainant's request. (TR 602)

Complainant worked in the clerical position until August 1997. At that time, on his physician's advice, Complainant again requested Respondent's approval to cease working due to disability. (TR 243) Complainant testified that he was unable to continue to work at Employer because he was too "depressed and anxious" due to his travails at work, including his clerical job itself and the delay in the approval of tuition reimbursement. Respondent again approved Complainant's disability leave. Complainant has not returned to work for Respondent since August 1997. (CX 9; TR 243-244)

Discussion

1. Complainant Engaged in Protected Activity

The initial question to be resolved is whether Complainant's protest about using the RHT and his refusal to use the RHT constitute protected activity under the ERA. Respondent does not dispute the fact that Complainant expressed these concerns. However, Respondent contends that because Complainant did not identify "any illegality for Sullivan" when he raised concerns about the calibration of the RHT, the "plain" requirements of §5851(a)(1)(B) are not met. Respondent's argument is incorrect. The purpose of the Act is to encourage the reporting of matters involving or relating to nuclear safety. The Act must be read broadly because "[a] narrow hypertechnical reading of section 5851 will do little to effect the statute's aim of protecting." Kansas Gas & Electric Company, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986). The Act has a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir. 1984)

Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear statutes. S. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK, 35-47 (1990). In order to establish a *prima facie* case of discrimination under the ERA, a complainant'scharge must relate to some aspect of nuclear safety. Decresci v. Lukens, 87-ERA-13 (Sec'y Dec 16, 1993). In Jarvis v. Battelle Pacific NW Laboratory, 97-ERA-15 (ARB Aug. 27, 1998), the Administrative Review Board (the "ARB") held that "[t]he protection afforded whistle-blowers by the ERA extends to employees who, in the course of their work, must make recommendations regarding how best to serve the interest of nuclear safety, even when they do not allege that the *status quo* is in violation of any specific statutory or regulatory standard."

In the instant case, I find that Complainant's complaints about the RHT constitute protected activity. An employee's own uncorroborated testimony about an internal safety complaint to a

supervisor constitutes evidence of protected activity. Here, Complainant testified without contradiction that he raised his safety concern regarding the calibration of the RHT to management on various occasions: with Sullivan on May 29, 1995 and again on June 13, 1995 (TR 151), Famulari on June 5, 1995 (TR 141), and Venkataraman on June 12, 1995 (TR 147-149). The intent of the Act is to protect employees who report the type of concern Complainant related to his supervisors and to the NRC.

Respondent also contends that Complainant's refusal to use the RHT is not protected activity. For this contention, Respondent relies on various decisions of the Secretary which have defined when a refusal to work will be considered "protected activity":

> A worker [must have] a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience . . . Refusal to work loses its protection after the perceived hazard has been investigated by responsible management officials . . . and, if found safe, adequately explained to the employee.

Beck v. Daniel Construction Co., 86-ERA-26 (Sec'y Aug. 3, 1993), quoting Pensyl v. Catalytic, Inc., 83-ERA-2 (Sec'y January 13, 1984)

In the instant case, I find that Complainant had a reasonable, good faith belief that conditions were unsafe, and that Respondent had not provided sufficient information to dispel these concerns or adequately explain the safety issues raised. Complainant's uncontradicted testimony shows that he had a good faith belief that use of the RHT would be unsafe. Complainant testified that he believed that it was irresponsible to use either scale on a machine that could be out of calibration or be a safety concern, because of the risk that he might "accept a component that could be...unacceptable [for use] in a nuclear power plant." (TR 155, 118) Complainant also testified that he refused to perform the go/no go test requested by Sullivan, because Complainant believed that it would not adequately determine whether the machine was out of calibration. (TR 433-434) Complainant stated that he believed that the go/no go test was not sufficient, and that he "felt it would be irresponsible to perform such a test when in doubt." (TR 432-433) Complainant also stated that when he first raised his concerns about the use of the machine, Sullivan did not explain or address the safety concerns raised. Rather, Complainant was told by Sullivan to "just do it... just perform the inspection of the [RHT]." When Complainant was asked to perform the go/no go test and refused, Sullivan did not explain to Complainant how such a test would resolve Complainant's safety concern. (TR 115, 430-432)

Based on the foregoing, I find that both Complainant's expressions of concern regarding the RHT and his refusal to use the RHT constitute protected activity under the ERA.

2. The Complaint was Untimely Regarding Respondent's 1995 Actions

Although the protected activity occurred on May 29, 1995 and Respondent acted against Complainant almost immediately, Complainant did not file a written complaint until July 7, 1997.[6] On that date, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor (the "DOL"). (CX 5) Respondent argues that Complainant's claim of unlawful retaliation under 42 U.S.C. §5851 should be dismissed because it was not filed within the ERA's 180-day statute of limitations period. Complainant did not address this issue in his brief. However, an argument might be made that several theories provide a basis for finding that there was a timely complaint.

At the hearing, Complainant stated that his first contact with a governmental agency regarding his "complaint" occurred on June 18, 1995, when he telephoned the NRC. (TR 195) On June 22, 1995, David Vito, an NRC "senior allegation coordinator," sent Complainant a letter which states in pertinent part (CX 19):

> This refers to your telephone conversation with Mrs. J. Johansen on June 18, 1995, and a subsequent telephone conversation with me on June 19, 1995, in which you stated the following. (1) You questioned a Sr. QA [quality assurance] engineer about the use and calibration of a Rockwell/Wilson hardness tester used for QA receipt inspection. Although the instrument had a current calibration sticker, one of the scales was not working properly. The QA engineer recommended you check the scale with a Go/No Go type of test; your comment to the engineer was that the operating procedure for the tester did not allow for a Go/No Go type of test, which resulted in an argument; and (2) after the argument with the QA engineer, you have since been subjected to harassment and intimidation, including having your site access removed and being put on suspension from the QA department while an investigation is performed of your work.... Regarding the discrimination stated above, the Department of Labor (DOL) has authority to order backpay, reinstatement, or compensatory damages.

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[6] Under 29 C.F.R. Part 24, the Secretary has delegated the authority to investigate complaints under the ERA to the Assistant Secretary of the Occupational Safety and Health Administration ("OSHA''),effective for all complaints received on or after February 3, 1997. Prior to February 3, 1997, the Wage and Hour Division of the DOL was assigned this task.

> In order to protect your rights, you must file a written complaint with DOL within 180 days of the occurrence of the discrimination. Any such complaint can be filed with your local DOL office or :
>
> The Office of Administration
> Wage and Hour Division
> Employment Standards Administration
> U.S. Dept. Of Labor, Room S 3502
> 200 Constitution Ave. N.W.
> Washington, D.C. 20210

Enclosed with the letter was a copy of the DOL's "Procedures for Handling of Discrimination Complaints Under Federal Employee Protection Statutes."

In late August 1995 and in September 1995, Complainant telephoned Richard Daly of the OSHA office of the DOL. (TR 196) Complainant testified that he did not give his name to Daly on either occasion and that he called the DOL "seeking information on how to go forward with a complaint".[7] (TR 197) Complainant did nothing further until more than eight months later when, on May 25,1996, he met with Daly. At that time Claimant and Daly discussed Complainant's protected activity and the perceived retaliation that resulted from that activity. (TR 199) Daly informed Complainant that because the alleged discriminatory acts against Complainant were not continuing in nature, and because the first alleged act of discrimination had occurred in June 1995, the 180-day limitations period had expired. (TR 202) Complainant did not attempt to submit a written complaint at that time. (TR 203) Complainant had no further contact with the DOL until over a year later when, on July 7,1997, he submitted the written complaint which is now under consideration. (TR 206)

The employee protection provisions of the ERA and the regulations implementing them provide that any complaint shall be filed in writing within 180 days after the occurrence of the alleged violation. 42 U.S.C. §5851(b)(1); 29 C.F.R. §24.3(b). The time period for administrative filings begins on the date that the employee is given final and unequivocal notice of the employer's employment decision. The Supreme Court has held that the proper focus is on the time of the discriminatory act and not the point at which the consequences of the act become painful to the employee. Chardon v. Fernandez, 454 U.S. 6, 9 (1981); Delaware State College v. Ricks, 449 U. S. 250 (1980); See English v. Whitfield, 858 F.2d 957, 961 (4th Cir. 1988).

In his July 7, 1997 written complaint, Complainant alleged that the following acts of Respondent were retaliatory and discriminatory:[8] audit of Complainant's work on May 31, 1995;

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[7] Complainant concedes that his anonymous telephone conversations with Mr. Daly do not constitute a complaint. (TR 197)

[8] Complainant also generally alleges that he was subjected to continuing harassment and intimidation, a claim which is addressed below in the analysis of whether Complainant has established

counseling and warnings issued on June 5, 7, and 12, 1995; suspension for 20 days commencing on June 14, 1995; placement in a "demeaning" job commencing on March 30, 1997; and "delaying" approving his request for tuition assistance in the summer of 1997.[9] The written complaint filed with the DOL on July 7, 1997, was well within 180 days of the acts which allegedly occurred in 1997, but well beyond 180 days after the occurrence of the alleged 1995 retaliatory acts. Therefore, the Complaint is not time-barred with respect to the 1997 acts (placement in a "demeaning" job, and "delay" in approving tuition reimbursement).

With regard to the alleged acts of discrimination which occurred in 1995, Respondent notes that a timely written complaint is necessary to satisfy the requirements of the Act and the regulations, and that Complainant's written complaint, filed on July 7, 1997, was filed well after the 180-day limitations period had expired. Respondent also contests the argument that, nevertheless, its 1995 acts are not time-barred under the theories that 1) a "continuing violation" existed, and 2) Complainant's oral communication with the NRC on June 18, 1995, and the NRC's subsequent June 22, 1995 letter to Complainant memorializing that oral communication fulfill the requirement of "filin[g] a complaint with the Secretary of Labor" (42 U.S.C. §5851(b)(1)), and the requirement that the complaint must be in writing (29 C.F.R. §24.3).

The continuing violation theory with regard to whether a complaint was timely filed has its origin in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1988). Thomas v. Arizona Public Service Co., 89-ERA-19 (Sec'y Sept. 17, 1993), citing Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983), cert. denied, 479 U.S. 868 (1986). The Secretary has held that a complaint of retaliation is timely under the continuing violation theory where there is an allegation of a course of related discriminatory conduct and the complaint is filed within the applicable limitations period. Garn v. Benchmark Technologies, 85-ERA-21, (Sec'y Sept. 25, 1990). To establish a continuing violation, a complainant must show that the employer engaged in a series of related acts, one or more of which fell within the 180-day period. See Berry, 715 F.2d 971 at 979. Courts generally recognize an equitable exception to statutory limitations periods for continuing violations "'[w]here the unlawful employment practice manifests itself over time, rather than as a series of discrete acts.'" McCuistion v. Tennessee Valley Authority, 89-ERA-6 (Sec'y Nov. 13, 1991), citing Waltman v. Intern. Paper Co., 875 F.2d 468, 474 (5th Cir. 1989). Therefore, in order to invoke the exception, the employee must show that an ongoing violation, and not just the effects of a [distinct] previous violation, extended into the statutory period. McCuistion, 89-ERA-6, citing Bruno v. Western Elec. Co., 829 F.2d 957, 960 (10th Cir. 1987).

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a "continuing violation."

[9] At the hearing, complainant also alleged that Respondent "deliberately" disposed of the personal contents of his office after his transfer. (TR 244-247) However, as Complainant did not identify this act in his written complaint, and as Complainant admitted at the hearing that there was no evidence that Respondent deliberately discarded his belongings (TR 245), this act cannot be found violative of the ERA.

The Secretary in McCuistion, quoting Berry, 715 F.2d at 981, identified the following three factors that bear on this determination:

(1) Subject matter. Do the acts "involve the same type of discrimination, tending to connect them in a continuing violation?" See Graham v. Adams, 640 F. Supp. 535, 538-539 (D.D.C. 1986) (continuing violation allegations must connect remote claims to incidents addressed by claims timely filed).

(2) Frequency. Are the acts "recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision?" Under this factor, a continuing violation can be established either through a series of discriminatory acts against an individual or by a respondent's policy of discrimination against a group of individuals. McCuistion, citing Green v. Los Angeles Cty. Superintendent of Sch., 883 F.2d 1472, 1480-1481 (9th Cir. 1989). The distinction is between "'sporadic outbreaks of discrimination and a dogged pattern.'" Id., citing Bruno, 829 F.2d at 960.

(3) Degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? In considering the third factor, the court in Waltman, 875 F.2d at 476, reasoned:

> Acts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of a promotion. If the person harassing a plaintiff leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff a promotion leaves, the plaintiff is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated.

This inquiry, of necessity, turns on the facts of each case. Berry, 715 F.2d at 981. In the instant case, Complainant alleged in his July 7, 1997 complaint (see supplementary letter attached to complaint) that "since 5/29/95 [he has] been continually placed under severe scrutiny and subject to many different forms of harassment/intimidation." Purportedly to illustrate this, Complainant provided a list of alleged occurrences commencing on May 29, 1995 and ending on July 1, 1997. (CX 5) Most of the occurrences took place in 1995 and culminated on November 13, 1995, when Complainant was transferred to a new position with Employer. The most serious of these are: audit of Complainant's work on May 31, 1995; counseling and warnings issued on June 5, 7, and 12, 1995; suspension for 20 days commencing June 14, 1995; removal of Complainant from his desk site and relocating him in a "cubicle" directly outside Famulari's office; suspension of Complainant's certification; and subjecting him to a "subjective and unfair" remediation process in order to regain his certification. The remainder of the alleged occurrences did not take place until 1997.

Complainant has made no discernible allegations of discriminatory acts between November 1995 and March 1997, when Complainant was placed in a clerical position.

After a careful review of Complainant's list, I find that the 1997 actions of Respondent alleged by Complainant to be discriminatory — assignment to a "demeaning" clerical position and "delay" in approving tuition assistance for a computer course — are separate and distinct from the 1995 acts. Therefore, under the three-factor test utilized in Berry, the 1997 events are not a continuation of the 1995 events. First, with regard to subject matter, the alleged 1997 acts do not involve the same type of discrimination as the alleged 1995 acts which would tend to connect them in a continuing violation. The reassignment to a clerical position was not to penalize Complainant, but was Respondent's acquiescence in Complainant's own request for a transfer out of the Pilgrim plant. Complainant did not suffer any loss of wages or benefits as a result of this transfer. Indeed, Complainant did not tell Respondent he was dissatisfied with the clerical job until he quit in August 1997. Nor was the delay in the approval of the tuition request an attempt to penalize Complainant but, at worst, resulted from a bureaucratic mix-up within Employer's management. Thus, I find that the 1997 acts are different in kind from the 1995 acts, and do not consistently affect the same singular aspect of complainant's employment. Second, with regard to frequency, the acts did not recur throughout the 1995-1997 period. Rather, the 1997 acts occurred separately, almost two years later. Third, with regard to the degree of permanence, the record indicates that Complainant met with a DOL representative on May 25, 1996, where the two discussed 1) Complainant's alleged protected activity and the perceived retaliation (throughout 1995) that resulted from that activity; and 2) Complainant's desire to file a complaint at that time based on the 1995 discriminatory acts. (TR 199) Therefore, based on Complainant's own actions, it is clear that the 1995 acts identified by Complainant at this meeting (performance evaluation, suspension, harassment and eventual transfer) were sufficiently permanent to alert him to the possibility that Respondent had a discriminatory motivation at that time. See McCuistion v. Tennessee Valley Authority, 89-ERA-6 (Sec'y Nov. 13, 1991), and Eisner v. United States Environmental Protection Agency, 90-SDW-2 (Sec'y Dec. 8, 1992). Consequently, there is no evidence of a series of related acts of discrimination, and the alleged 1995 violations do not carry forward into the 180-day period following the alleged 1997 violations.

At the hearing, Complainant argued that the acts of discrimination cited in the July 7, 1997 complaint are "still related to the incident on May 29, 1995" and that at the time of the filing "[he]... still had lost wages...still had falsification [charges] (i.e., Respondent's charges against Complainant that he falsified his work records) on [his] record...and still had numerous amounts of discriminatory things that..." continued to affect him. (TR 203-204) It thus appears that Complainant claims that Respondent's actions were related because they all allegedly "continued" to affect his general working conditions and well-being. Gillilan v. Tennessee Valley Authority, 92-ERA-46 (Sec'y Apr. 20, 1995) However, such effects are not sufficient to establish the link that is necessary in order for the various acts to come within the continuing violation concept. Id. Violations are not "continuing" merely because their effects carry forward. See English v. Whitfield, 858 F.2d at 962-963. Based on the foregoing, I again find that the alleged 1995 acts of retaliation are not preserved for Complainant under the continuing violation theory.

The next question is whether Complainant's oral communication with the NRC on June 18, 1995 constitutes a complaint under the Act and the regulations. It is clear that a complaint under the ERA must be in writing. Mitchell v. EG & G (Idaho), 87-ERA-22 (Sec'y July 22, 1993). However, it has been held that an OSHA agent's written memorandum of his telephone conversation with a complainant satisfies the writing requirement. Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983); see Roberts v. Rivas Environmental Consultants, Inc., 96-CER-1 (ARB Sept. 17, 1997) Thus, the question follows of whether the NRC's June 22, 1995 letter memorializing Complainant's allegations of discrimination under the Act satisfies the "in writing" requirement. In Dartey, the regulation required that the complaint be filed with the Wage and Hour Division, but the employee had a conversation with OSHA. The administrative law judge's opinion (which was "adopt[ed]" by the Secretary) noted that since "OSHA is not an independent government agency, but is a component part of the Department of Labor, there was literal compliance with paragraph (b)(1) of section 5851 mandating that within thirty days after such violation occurs, one may 'file... a complaint with the Secretary of Labor.'" Dartey held that under such circumstances, there had been "a filing in the wrong office of the right Department ... and the regulatory limitation [period] is tolled." The instant case does not fall within the Dartey circumstances, as the NRC is not a component of the DOL. Further, in the instant case there has not been literal compliance with the ERA.

The final question is whether the circumstances of the instant case come within the broad concept of "equitable tolling," wherein the 180-day time limit is considered a statute of limitations which can be tolled where a duly diligent employee is excusably ignorant of his or her rights. See School District of the City of Allentown v. Marshall, 657 F.2d 16, 19-21 (3d Cir. 1981); Lastre v. Veterans Administration Lakeside Medical Center, 87-ERA-42, slip op. at 2-4 (Sec'y Mar. 31, 1988), In School District of City of Allentown, a case involving the Toxic Substances Control Act, 15 U.S.C. §§2601-2629, the court summarized the situations in which equitable tolling is "appropriate": (1) the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. 657 F.2d at 19-20 (relying on Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978)).

Complainant does not assert, nor do I find any evidence to indicate, that he was misled by Respondent regarding his complaint or was prevented in some extraordinary way from exercising his rights. Complainant does assert, however, that he was misled by the NRC with regard to filing his complaint. Complainant testified that in June 1995 he was told by Richard Metakis of the NRC that "[he] did not have to act within a 180-day period from the original date [of the alleged violations ....i]f these acts of retaliation are related or are continuous from the original event." (TR 298) Even assuming this conversation took place, tolling is not justified in cases "where a government agency may have given confusing information but the [employer] was in no way responsible for [the employee's] failure to file a complaint within the statutory period." School District of the City of Allentown, 657 F.2d at 20-21. Moreover, based on Complainant's own testimony, the NRC representative merely explained the continuing violation theory to him, and did not advise him that a continuing violation was present in his case. Thus, the information provided to Complainant was

neither incorrect nor misleading. If Complainant believed that there was a continuing violation, he arrived at that conclusion on his own.[10]

As for whether Complainant has mistakenly raised the precise statutory claim in the wrong forum, one circumstance which would support "equitable tolling," I find this exception to be inapplicable.[11] In Rose v. Dole, 945 F.2d 1331 (6th Cir. 1991), a case involving the ERA, the court delineated five factors to be considered in determining whether equitable tolling of a limitations period is appropriate. Those factors are: (1) whether the plaintiff lacked actual notice of the filing requirements; (2) whether the plaintiff lacked constructive notice, i.e., his attorney should have known; (3) the diligence with which the plaintiff pursued his rights; (4) whether there would be prejudice to the defendant if the statute were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights. 945 F.2d at 1335 (citing Wright v. State of Tenn., 628 F.2d 949, 953 (6th Cir. 1980) (*en banc*)).

I find that Complainant was not adequately diligent in the pursuit of his claim and that his putative ignorance of his rights is not reasonable. The factors supporting this finding are: 1) the NRC's June 22, 1995 letter advising him of the necessity of filing a complaint, 2) Complainant's testimony at the hearing that he anonymously spoke with Richard Daly of the DOL on several occasions in 1995 concerning how to file a complaint, and 3) Complainant's lack of adequate explanation as to why he did not file following receipt of the NRC's letter (other than his own alleged belief that there existed a continuing violation which would extend the 180-day period). Further, Complainant testified that when he initially contacted the NRC his focus was on "safety issues with the Commission," and that he was subsequently given specific information by the NRC about where to file a claim alleging discrimination. (TR 297) Thus, there is no evidence that Complainant "mistakenly" filed the precise statutory claim of discrimination in the wrong forum. See Wood v. Lockheed Martin Energy Systems, 97-ERA-58 (ARB May 14, 1998) (equitable tolling not applicable where there is no evidence that employee filed in wrong forum by mistake); see also Harrison v. Stone and Webster Engineering Corp., 91-ERA-21(Sec'y Oct. 6, 1992)(precise statutory claim in wrong forum not raised where complainant stated in affidavit that "[t]he reason I complained to the U.S. Nuclear Regulatory Commission was because of my duty as a professional nuclear engineer."). Finally, I find that tolling would result in prejudice to Respondent. Section 5851(b)(1) states that "[U]pon receipt of ... [a] complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint...." Here, unlike cases relying on the "wrong forum" tolling doctrine, the record does not show that Respondent "received timely notice of the specific statutory claim that was subsequently asserted" by Complainant, thereby providing Respondent with the protection which the

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[10] Complainant may have obtained misinformation from his own attorney. Complainant testified that on November 2, 1995 he consulted with his attorney regarding Respondent's alleged discrimination. (TR 479-480) Further, it therefore appears that Complainant was not a lay person who was acting wholly without his own private attorney's advice within the 180-day period.

[11] Despite the similar language used in Dartey, that case did not involve a filing in the wrong "forum," but merely in the wrong subagency of the DOL.

expeditious time frame is intended to provide. Gabrielli v. Enertech, 92-ERA-51 (Sec'y July 13, 1993) Indeed, the record indicates that Respondent was not aware that a complaint of any kind had been filed by Complainant until at least August 8, 1997, when OSHA advised Respondent that an "investigation under the [ERA], conducted by [OSHA], had resulted in a dismissal of this matter." (This notification served only to inform Respondent that a complaint had been filed and dismissed. Apparently, Respondent did not learn of the substance of the complaint until sometime after August 8, 1997. See Respondent's Motion for Continuance of Hearing Date, filed on October 21, 1997.)

Summing up, the instant case involves the application of equitable principles, commonly known as "fairness." I have found only two cases in which the Secretary or the ARB found that the employee had filed "the right claim in the wrong forum" — Sawyers v. Baldwin Union Free School District, 85-TSC-1 (Sec'y Oct. 5, 1988), and Immanuel v. Wyoming Concrete Industries, Inc., 95-WPC-3 (ARB May 28, 1987). In neither of these cases were all the equitable considerations weighed. Further, in both cases the adjudicative tribunals were faced with statutes of limitations with very abbreviated time periods of 30 days within which the employee was compelled to file a written complaint. Certainly, fairness to the employees in those circumstances looks quite different than it does in the instant case where Complaint had 180 days to file. Finally, Complainant has offered no exculpatory explanation which I find credible for failing to timely file a complaint with the DOL after this process was clearly explained to him in the NRC's June 1995 letter. Accordingly, I find that Complainant simply "sat on his rights." Under these circumstances, there is no principle of equity which militates in Complainant's favor.

Based on the foregoing, a finding of equitable tolling is not appropriate in this case, and Complainant's claim is time-barred as it relates to alleged discrimination which occurred in 1995.[12]

3. Respondent's 1997 Acts Did Not Violate the ERA

As noted above, the written complaint Complainant filed with the DOL on July 7, 1997, was timely with respect to Respondent's alleged 1997 acts: placing him in a "demeaning" job, and "delay" in approving tuition reimbursement. I now turn to the consideration of whether those acts violate the ERA.

[12] Therefore, I need not make a determination as to whether Respondent's 1995 actions against Complainant violated the ERA. However, at first blush, it appears Complainant could establish a *prima facie* case that Respondent's 1995 acts were discriminatory.

To establish a *prima facie* case of retaliation or discriminatory motivation under the whistleblower provision invoked in this case, a complainant must show that (1) the complainant engaged in protected activity, (2) the employer was aware of that protected activity, and (3) the employer took some adverse action against the complainant. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan 18 1996); Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983). However, as will be discussed below, in the instant case Complainant has failed to establish took adverse action against him.

The courts have held in similar contexts that, "An adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." Stone & Webster Engineering Corp. v. Herman, 1997 U.S. App. LEXIS 16225, No. 95-6850 (11th Cir. July 2, 1997). Clear examples of adverse employment actions include dismissal, demotion, or an involuntary transfer to a less desirable position. Mandreger v. Detroit Edison Co., 88-ERA-17 (Sec´y March 30, 1994); Nichols v. Bechtel Constructors, Inc., 87-ERA-44 (Sec´y Oct. 26, 1992); English v. General Electric Co., 85-ERA-2 (Sec´y Feb. 13, 1992). Monetary loss is not required. Boytin v. Pennsylvania Power and Light Co., 94-ERA-32 (Sec´y Oct. 20, 1995).

Placement in a "demeaning" clerical position

I find that there is no evidence of record that indicates that Complainant's transfer to a clerical position was an "adverse action" by Respondent. To the contrary, the evidence, including Complainant's own testimony, reveals that Complainant requested a transfer out of the Pilgrim plant and that Respondent merely reasonably accommodated that request.

Complainant concedes that he originally left his job as a mechanical planner and went out on disability at his physician's request, based on Complainant's "physical and mental conditions at the time." (TR 485) Complainant's doctors advised that Complainant should not return to work as a mechanical planner, and that he should leave the "nuclear organization" completely. (TR 491) Complainant agreed with his doctor's assessment, and did not seek to return to his former position. (TR 492) Instead, Complainant desired to be employed "some place else" with Employer, not in the the Pilgrim plant. (TR 493) Respondent acquiesced in Complainant's request, and found him employment in the billing department at the corporate office.[13] (TR 218)

Complainant admitted that he after he was transferred, he "was satisfied that he was not part of the nuclear organization any longer." (TR 496-497) Moreover, Complainant's pay and benefits were not reduced, despite the fact that he was performing only clerical duties. (TR 482) Further, Complaint's union representative informed him that no better position was available, and that the

[13] Employer made this accommodation for Complainant notwithstanding the fact that over the years it has had "huge reductions" in the number of employees at its corporate center, and its corporate office has reduced "by the hundreds" the number of professionals and engineers who hold the same degree and qualifications that Complainant has attained. (TR 493)

clerical job was the only place he could be put at the time. (TR 23, 498) Indeed, the record contains no contrary evidence. Finally, Complainant never complained to management about the clerical job, nor did he request any other job with Employer. (TR 221)

Based on the above, I find that Complainant has failed to establish that his placement in a clerical position at Respondent's corporate office was an adverse action. Thus, Complainant has failed to establish a crucial element of a *prima facie* case, and I am unable to find that Respondent violated the ERA by transferring him to a clerical job.

Delay in approving tuition reimbursement

Based on my earlier discussion regarding Complainant's tuition reimbursement request, I find that there is no evidence of record to suggest that the "delay" in approving the request constitutes an adverse action by Respondent. Rather, I find that there was no extraordinary delay and that Complainant's application was approved relatively promptly in the ordinary course of business.

Complainant's request was originally denied because his former manager, Stu Minihan, erroneously believed that Complainant was still employed at the Pilgrim plant and that a computer course would not enhance his current job skills or current level of performance. (CX 6) Upon receipt of Minihan's recommendation, Complainant contacted Sandra Stracqualursi, a tuition administrator at Employer, who immediately disagreed with Minihan and sent him an E-mail message to that effect. (TR 224) Straqualursi was unable to reach Minihan because he was in the process of leaving Employer (or had already left) (TR 583-584). Therefore, she called Lee Wise of human resources. Wise immediately attempted to contact Minihan, but also was unsuccessful. (TR 584) Because Minihan was not available, Wise contacted Claire Goddard, who was the "next higher level of management" above Minihan. (TR 584) Wise asked Goddard if he would consider signing the tuition reimbursement approval. Goddard said that he would, and that he would also immediately send an E-mail to Straqualursi to that effect. (TR 585-586) Goddard immediately sent Straqualursi the E-mail message which stated that the reimbursement was recommended for approval. (CX 6) Wise secured the necessary approval on the same day that she learned of Complainant's request. (TR 602) The entire period of time from Complainant's request for tuition aid until it was approved was thirty-three days.

Wise testified that the "delay" in this case was "not unusual" "because the policy [for approving tuition requests] is applied so broadly, it's not unusual for a manager to question why they were approving a tuition reimbursement if they can't see that it adds value...it's not unusual to have to get some concurrence." (TR 607) Wise also testified that "it's not unusual to take a month" to have a tuition reimbursement approved. (TR 607) (It appears that, ultimately, Complainant was unable to take advantage of the tuition reimbursement because he left his employment with Employer in August 1997 prior to the start of the computer course.)

Accordingly, I find that Complainant has not established that the "delay" he experienced in having his tuition reimbursement approved was an adverse action. Thus, this conduct by Respondent did not violate the ERA.

CONCLUSION

I have found that Complainant's expressed concerns about the RHT and his refusal to use this device constitute protected activity under the ERA. However, the outcome of this case has been resolved by my findings that (1) Complainant's contact with the NRC in June 1995 does not constitute the filing of a complaint under the ERA, (2) Respondent's alleged pre-1997 acts of retaliation are time-barred under the ERA because the complaint filed on July 7, 1997 was not timely with regard to those acts, and (3) Respondent's 1997 acts were not discriminatory nor adverse to Complainant, and therefore those acts do not violate the ERA.

Based on my findings of fact and conclusions of law, the complaint must be denied.

ORDER

The complaint of Douglas W. Foley is denied.

Robert D. Kaplan
Administrative Law Judge

Date: December 2, 1998
Camden, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).